PUBLIC PROSECUTOR

v.

ABDUL RAHIM ABDUL SATAR

HIGH COURT MALAYA, KUALA LUMPUR
WAN YAHYA J
[CRIMINAL APPEAL NO. 52-20 OF 1988]
4 NOVEMBER 1989

EVIDENCE: *Hearsay evidence - Whether writer must always be the maker of document - Whether document admissible in evidence - Maker is person who authenticates - Section 425 of Criminal Procedure Code - Just decision.*

Two questions arose in this appeal, (a) whether, P7, being a prepared typewritten sheet bearing the serial numbers of all the trap notes, was inadmissible as being hearsay evidence, and (b) whether the learned Sessions Judge was empowered under the circumstances to exercise his powers under s. 425 of Criminal Procedure Code.

The accused/appellant was convicted for an offence under s. 4(a) of the Prevention of Corruption Act 1961 but was acquitted in respect of the other two offences under the same Act. During the prosecution case, the Investigating Officer produced a list (P7) bearing the numbers of all the trap notes recovered from the accused's pocket. According to the Investigating Officer, he had obtained these notes earlier from another officer Lai Peng Cheong (LPC) together with P7. On receipt of these items he had compared the numbers on P7 with the trap notes and having found the notes to be correlative with the numbers on P7, he had signed P7 as the person who handed over or delivered the money and the complainant also signed as the receiver of these notes. A witness's signature also appeared.

Appellant's Counsel objected to the production of P7, contending that Lai Peng Cheong, the maker of P7, was not called as a witness but merely made available to the defence. Thus, it was argued, that P7 was inadmissible, being hearsay evidence, however, the learned Sessions Judge disagreed, but nevertheless, exercised his power under s. 425 of Criminal Procedure Code to call for Lai Peng Cheong's evidence. The appellant's Counsel likewise objected to what he contend was the Court's usurpation of the prosecution's power.

Held:

[1] The mere deed of composing, framing, ascribing, or preparing a document or reducing certain details into writing, does not *ipso facto* turn the writer into the maker of a document, within the contemplation of the hearsay rule. In the Court's opinion, the affirming person, for whose purpose or on whose behalf the averments contained in the documents are made, is the actual maker of the document. The maker is the person who authenticates the document. Exhibit P7 was a mere acknowledgement and receipt between the Investigating Officer and the complainant and Lai Peng Cheong is merely the person who assists in the preparation of P7. P7 is therefore admissible in evidence.

[2] If the learned Judge had considered it essential in order to arrive at a just decision to call for the formal evidence of a witness, then he is entitled and indeed bound to do so under s. 425 of the Criminal Procedure Code. The role of a Judge in our adversarial system of justice is often depicted symbolically as a blindfolded lady balancing the scales of justice.

A Judge should not be completely oblivious to the surrounding events at the trial affecting his assessment of a case. It is true that he must not load into any side of the scales extrinsic evidence, but he certainly owes a duty to take into the scales formal evidence which, although available and alluded to, was inadvertently left out by either party.

[Appeal dismissed.]

Cases referred to:
Ramli bin Kechik v. PP [1986] 2 MLJ 33
PP v. Phon Nam [1988] 3 MLJ 415

Legislation referred to:
Criminal Procedure Code, s. 425
Prevention of Corruption Act 1961, ss. 3(a)(i), 4(a)

For the appellant - Abdul Rashid bin Sudin
For the respondent - S. Selvarajah; M/s. Fernandez & Co.

JUDGMENT

Wan Yahya J:

The appellant was tried before the Sessions Court for an offence under s. 3(a)(i) of the Prevention of Corruption Act 1961 and two other offences under s. 4(a) of the same Act. He was acquitted in respect of the first two charges and convicted for the third offence under s. 4(a) of the Act against which he now appeals.

In the course of the prosecution's case the I.O. produced a list (P7) bearing the numbers of all the trap notes recovered from the accused's pocket. According to the I.O. he had obtained these notes earlier from another officer Lai Peng Cheong together with a prepared list containing these numbers in the following form:

Senarai Wang Bertanda Berjumlah RM2,500 Rpt. Polis Balai Ampang 10347/85:

24 keping Not RM50 bersiri

1.	VJ	9819061	13.	VJ	9819074
2.	VJ	9819062	14.	VJ	9819075
3.	VJ	9819064	15.	VJ	9819076
4.	VJ	9819065	16.	VJ	9819077
5.	VJ	9819066	17.	VJ	9819078
6.	VJ	9819067	18.	VJ	9819079
7.	VJ	9819068	19.	VJ	9819080
8.	VJ	9819069	20.	VH	9337282
9.	VJ	9819070	21.	VK	1063190
10.	VJ	9819071	22.	VK	4239073
11.	VJ	9819072	23.	VK	4239074
12.	VJ	9819073			

8 keping Not RM100 bersiri:

1.	ZA	4043876
2.	ZB	1453958
3.	ZC	4308791
4.	ZC	6244990
5.	ZC	4032695
6.	ZC	4032697
7.	ZC	3430371
8.	ZC	6526610

1 keping Not RM500 bersiri:

1. ZV 0628776

Saya telah menyemak wang dari pocket kiri baju saya dan telah disemak dengan senarai wang bertanda dan didapati adalah betul.

2.45 hrs. 5 October 1985

Tandatangan Penerima
t.t. 5 October 1985

Tandatangan Penyerah
t.t. 5 October 1985

Tandatangan Saksi
t.t. 5 October 1985

On receipt of these items he had compared the numbers on the prepared list with the notes and having found the notes to be correlative with the numbers on the list, he had signed the list as the person who handed over or delivered the money and the complainant also signed as the receiver of these notes. In addition there also appeared the signature of a witness.

Counsel for the appellant objected to the production of P7 contending that as Lai Peng Cheong was not called but merely made available to the defence, the list was inadmissible by virtue of the rule against hearsay evidence.

The learned Session Judge disagreed with this submission but nevertheless exercised his power under s. 425 of Criminal Procedure Code to call for Lai Peng Cheong's evidence. The appellant likewise objected to what he contends as the Court's usurpation of the prosecution's power. He maintains that without calling for the evidence of Lai Peng Cheong whom he argued to be the maker of the list P7 could not have been admitted and in the absence of this piece of evidence the prosecution would not have been in a position to prove that the trap notes were the actual ones found in the appellant's pocket.

The two contentious issues raised in this appeal therefore rest on two questions; firstly, whether P7 was inadmissable as being hearsay evidence, and secondly whether the learned Sessions Judge was empowered under the circumstances to exercise his power under s. 425 of Criminal Procedure Code.

The answer to the first issue can best be seen by examining the nature and purpose of preparing P7. The evidence as recorded by the learned Sessions Judge shows that Lai Peng Cheong had handed over to PW5, the I.O., a prepared typewritten sheet bearing the serial numbers of all the trap notes. It is not known whether he typed the list himself or that he had asked a typist to do so. The document was entitled list of marked money amounting to RM2,500 followed by the report no. 10347/85. Then following that, under separate denomination of the RM50, RM100 and RM500 notes, were the serial numbers of each note. At the bottom there appears in the spaces provided the signature of the I.O. as the person who delivered the money, the complainant as the receiver of the same and an unidentified witness. There was no signature of Lai Peng Cheong on the document. Even at a glance it is obvious to me that this document was nothing more than an acknowledgement by the I.O. to the effect that he had delivered the notes which serial numbers appeared on the list and a similar acknowledgement from the complainant that he had received that money. By

comparing the unsigned list against the notes and then signing the same, the I.O. had in effect authenticated and endorsed the unsigned P7 as his own document. After all he was the person who compared the notes and could vouch for the correctness of the numbers that had been inscribed and he had authenticated the list by setting down his signature on it and not Lai Peng Cheong. Likewise the complainant by signing as a receiver of the document had adopted the same as his letter of acknowledgement or his receipt.

The mere deed of composing, framing, ascribing, or preparing a document or reducing certain details into writing, does not *ipso facto* turn the writer into the maker of a document within the contemplation of the hearsay rule. In my opinion, the affirming person for whose purpose or on whose behalf the averments contained in the documents are made is the actual maker of the document. The petition writer, typist or even a lawyer who prepares a document for his client is not himself a maker but it is the person who assists in the preparation of the document. The maker is the person who authenticates the document. Exhibit P7 to my mind is a mere acknowledgement and receipt between the I.O. and the complainant and Lai Peng Cheong is merely the person who assists in the preparation of the acknowledgement and receipt. The exhibit was therefore admissible evidence.

The second question to be considered is assuming that P7 was inadmissible was the learned Sessions Court Judge right in invoking s. 425 to call for the witness after the close of the prosecution's case. Counsel sought to distinguish the Supreme Court case of *Ramli bin Kechik v. PP* [1986] 2 MLJ 33 by reference to a passage at 34F (right column) which he contends was taken from *Abdul Munim Khan v. The State of Hyderabad* AIR 1953 HYD. 145 (Vol. 40, C.N. 64). The passage of our Supreme Court judgment which appears in normal prints below reads:

> ...The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the Magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the Court would be justified in exercising its discretion in calling for additional evidence...
>
> *It is not desirable to allow the prosecution to patch up the evidence wanting in the case. Negligence on the part of the prosecution can never be a ground for taking additional evidence against the accused and by allowing such additional evidence, surely, justice would fail.*

It is the contention of Counsel that had the Supreme Court gone on to reproduce further the Hyderabad judgment in italics, above, it would have shown that the invoking of s. 425 to make out a gap in the prosecution case would result in failure of justice.

With respect, I don't think ratiocination is correct. It is obvious that the part of the Hyderabad Court judgment had been deliberately avoided in *Ramli Kechik's* case because that *dicta* did not find favour with our Supreme Court interpretation of s. 425. This subject and *Ramli Kechik's* case were again considered by the Supreme Court in *PP v. Phon Nam* [1988] 3 MLJ 415 in which the Court held that the trial Judge had failed to exercise his discretion properly when he refused to admit further evidence under s. 425 to confirm the endorsement made on certain exhibits.

Defence Counsel once again sought to circumscribe this case by reference to the words utmost circumspection in the passage at p. 416 right column H which appears as follows:

> Section 425 of the Criminal Procedure Code is clearly divided into two limbs; first, a discretionary provision which provides that the Court may, on an application, summon any person as a witness or recall and re-examine any person already examined at any stage or any inquiry, trial or other proceeding under the Code. In exercising the discretion under the first limb, the Court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Secondly, an imperative provision which requires the Court to do so where the Court is satisfied that the evidence to be summoned would appear to the Court to be essential to a just decision of the case...

In that paragraph the learned LP was elucidating the discretionary and imperative limbs of s. 425 and his admonition on utmost circumspection clearly refers to the first limb but not on the imperative provision where the Court considers the fresh evidence to be essential to a just decision.

The learned Sessions Judge in our present case before resorting to s. 425 of the Criminal Procedure Code, recorded the following remarks:

> Omission by prosecution to call the maker of P7 is a mere technical error. In the interest of justice and for the just decision of this case, the Court, on the authority of *Ramli bin Kechik* [1986] 2 MLJ 33/[1986] 1 CLJ 308 and the process conferred under s. 425 of CPC now describe that the maker of P7 should be called to testify and clarify the same.

It is apparent to me from the above expression that the learned Sessions Judge had considered it essential in order to arrive at a just decision to call for the formal evidence by Lai Peng Cheong which the learned Judge was entitled and indeed bound to do so under that provision of the Criminal Procedure Code.

The role of a Judge in our adversarial system of justice has often been misunderstood. Although depicted symbolically as a blindfolded lady balancing the scales of justice, a Judge should not be completely oblivious to the surrounding events at the trial affecting his assessment of a case. It is true that he must not load onto any side of the scales extrinsic evidence but he certainly owes a duty to take into the scales formal evidence which, although available and alluded to, was inadvertantly left out by either party. Consequently, and in reiteration of my earlier finding on the first issue, I would hold that P7 was admissible in evidence and even if it was not so, the learned Sessions Judge had exercised his power properly in calling for further evidence under s. 425 of the Criminal Procedure Code. I therefore dismiss the appeal against conviction.

As for the sentence, the learned deputy public prosecutor had moved the Court to enhance the punishment. I observe that the learned Sessions Court Judge has not only been unusually fair in acquitting the appellant of two other related charges but he was also unduly lenient when inflicting the prescribed punishment. However, this act of compassion and sympathy by the learned Sessions Court Judge was founded only on the sole consideration that the appellant was a first offender. In conceiving so he probably overlooked that in cases of corruption particulary by a government servant, there is no question of an offender having a second bite at the cake.

I do not intend here to add to the long list of authorities on the gravity of corruption cases where the prescriptive punishment for the offence had been held to be a custodial sentence.

However like the learned Sessions Court Judge, I am inclined to lean on the side of compassion not because this is his first offence but having regard to the loss of long service and his pension and gratuity.

Nevertheless a figure of RM5,000 for a bribe of RM2,500 is certainly too light a punishment. I will therefore enhance the figure of RM5,000 to RM7,500 in default 2 years' imprisonment.

Now turning back to the order of acquittal on the first two charges, the learned Sessions Court Judge gave several unelaborated reasons for doing so. Essentially he was reluctant to act on the uncorroborated evidence of the complainant whom he had found to be incoherent and shifty in his evidence. Learned deputy public prosecutor argued that the learned Sessions Court Judge should have nevertheless accepted this witness's evidence as not being inherently incredible and called for the defence. Having read the notes of evidence as recorded I find myself not only entirely in agreement with the trial Judge's findings, but also in the course of such perusal, I came across the confirmatory evidence which gave rise to his doubts. Even with the use of an aide memo, admitted in evidence in the form of his personal diary, the complainant faltered in his evidence and in one occasion had to correct his earlier testimony. However, the most crucial reason, which incidentally was not taken up by the defence, is that a person simply referred to as Ah Ming whom the complainant insisted was present with him on both occasions and therefore had heard and witnessed the transactions involving both charges were neither called or offerred to the defence. The question whether evidence is inherently incredible or not is a question of fact and in this case I think the learned Sessions Court Judge had every reason to hold it positively so. I therefore dismiss the cross appeal against acquittal on the 1st and 2nd charges.

Also found at [1990] 1 CLJ 840